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No. 85-12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

POTT INDUSTRIES INC.,
Petitioner,

vs.

INGRAM RIVER EQUIPMENT, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF FOR PETITIONERS

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TABLE OF AUTHORITIES

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Cases:

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Respondent suggests that there is no conflict between the opinion below and that of the Third Circuit in *East River Steamship Corp. v. Delaval Turbine, Inc.*, 752 F.2d 903 (3d Cir. en banc), *cert. pending*, No. 84-1726 (May 13, 1985) because the former involved only a negligence claim and the latter only a strict liability claim. This is incorrect. *East River* involved both strict liability and negligence claims, as the opinion and the petition for certiorari make clear. *Id.* at 908; Petitioner's Brief for Certiorari at 18-21, No. 84-1726.

Moreover, until the decision below, the courts have never treated the two theories of recovery differently for purposes of application of the economic loss doctrine. Indeed, the com-

peting policy considerations are between the need for *any* tort remedy (whether negligence or strict liability) in view of the availability of an unquestioned contractual remedy. As the Third Circuit said in the *East River* case:

> Our reasoning in this case is equally applicable to products liability cases brought in negligence and those brought in strict liability. . . . One of the cases we rely upon . . . , *Seely v. White Motor Co.*, 63 Cal. 2d 9, 45 Cal. Rptr. 17, 403 P.2d 145 (1965), involved negligence as well as strict liability claims, and the court in that case did not distinguish between the two theories in applying the rule against recovery of damages where an unreasonable risk of harm is not present.

Id. at 908 n. 2.

The direct conflict between the opinion below is clear. It is further highlighted by the fact that a petition for a writ of certiorari is now pending in *East River* seeking review of the identical question presented in this case. *East River Steamship Corp. v. Delaval Turbine, Inc.*, No. 84-1726 (filed May 13, 1985). This Court has previously said that it is a "constitutionally based principle" that the federal admiralty law should be uniform throughout the country. *Moragne v. States Marine Lines*, 398 U.S. 375, 402 (1970). The fact that the courts of appeals have been faced with this issue in one form or another four times in one year[1] demonstrates that it is a significant and recurring question requiring a definitive resolution by this Court at this time.

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[1] In addition to this case and *East River* in 1985, the economic loss doctrine was raised in 1984 in *Emerson G. M. Diesel v. Alaskan Enterprise*, 732 F.2d 1468 (9th Cir. 1984) and *Miller Industries v. Caterpillar Tractor Co.*, 733 F.2d 813 (11th Cir. 1984), as discussed in Pott's Petition for Certiorari at pp. 8-10.

CONCLUSION

The petitions for writs of certiorari in this case and in *East River* should be granted. The cases should be consolidated for argument to enable the Court to hear all viewpoints and finally resolve the split in the circuits with respect to the substantive admiralty law issues presented by the pending petitions.

Respectfully submitted,

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